CHOOI SIEW CHEONG

v.

LUCKY HEIGHT DEVELOPMENT SDN. BHD. & ANOR

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD. EUSOFF BIN CHIN CJ
TAN SRI DATO' HJ. MOHD. AZMI BIN DATO' HJ. KAMARUDDIN FCJ
DATUK CHONG SIEW FAI FCJ
[CIVIL APPEAL NO. 02-546-92]
22 FEBRUARY 1995

***LAND LAW** : Landowner entering into joint venture agreement to develop land - Developer assigning all rights and liabilities to first defendant - Landowner assigning all rights to plaintiff - First defendant holding developer's lots in trust for plaintiff until discharge of obligations under agreement - First defendant in breach of agreement - Plaintiff seeking retransfer of developer's lots to himself - Land subject to prohibitory order lodged by second defendant - Second defendant judgment creditor of first defendant - Whether second defendant had an interest in the land - Whether second defendant entitled to lodge prohibitory order against the land - Whether joint venture agreement between landowner and developer in the nature of a partnership - Partnership Act 1961, s. 26 - Whether plaintiff is a partner of the first defendant.*

***CONTRACT** : Joint venture agreement to develop land - Developer's lots transferred to first defendant - Agreement providing for retransfer of lots to plaintiff in the event of a breach - Second defendant lodging prohibitory order against land - Plaintiff seeking retransfer of lots - Construction of agreement - Whether there is a trust in favour of the plaintiff respecting those lots allotted to and already transferred to the first defendant - Principles applicable in the construction of an agreement.*

The plaintiff applied, *inter alia*, for declarations that he was the lawful owner of specified lots of land in the Mukim of Seremban and that the defendants did not have any interest in the said specified lots.

The plaintiff's father (the landowner) and a developer entered into a joint venture agreement (the agreement) to develop a piece of land into a housing estate. By a deed of assignment the developer assigned all his rights and liabilities under the agreement to the first defendant and by an agreement dated 1 July 1985 (the 1985 agreement) the landowner assigned all his rights to the plaintiff.

The 1985 agreement, *inter alia*, provided for the landowner to transfer the developer's lots in favour of the first defendant and for the plaintiff to be made a permanent director of the first defendant. The 1985 agreement further provided that the first defendant was deemed to hold all the developer's lots in trust for the plaintiff until the completion and discharge of all the first defendant's obligations under the agreement. It was further provided that in the event the first defendant was unable to carry on with the housing development, the first defendant was required to retransfer all the developer's lots to the plaintiff.

On a breach of the agreements, the plaintiff sought a retransfer of the developer's lots but discovered that the second defendant had lodged a prohibitory order against the said land. The second defendant claimed that it had a right to enter the prohibitory order in respect of the land as the said land was registered in the name of the first defendant, a judgment debtor

of the second defendant in respect of building works carried out on the land by the second defendant.

The learned trial Judicial Commissioner dismissed the plaintiff's application and held that the second defendant was entitled to lodge the prohibitory order and that the plaintiff could not seek a retransfer of the land to himself without first satisfying the judgment sum. The learned JC based his decision on the principal grounds that:

(1) As a party to the joint venture agreement, the plaintiff was a partner within the meaning of the term in the Partnership Act 1961 (the Act).

(2) The judgment obtained by the second defendant against the first defendant was for works done on the land registered in the name of the first defendant. In pursuance of the said judgment, the second defendant entered the prohibitory order against the said land.

The plaintiff appealed.

Held:

[1] The term "partnership" is defined in s. 3(1) of the Act as the relation which subsists between persons carrying on a business in common with a view of profit. In the instant case under appeal, the plaintiff (through his father who was a party to the initial agreement) provided the land and the first defendant was to provide capital, labour and services to develop and build on the land. Under the agreement, each was to take, to the exclusion of the other, certain sublots with or without buildings erected thereon respecting which there was to be complete freedom to deal or dispose as he or it wished.

[2] In the circumstances, as each intended a wholly separate business, there was no "business in common" nor, it follows, "with a view of profit" from such business. Therefore the agreements entered into did not result in a partnership.

[3] *Newacres Sdn. Bhd. v. Sri Alam Sdn. Bhd.* is not authority for the proposition that joint-venturers in all joint venture agreements are partners within the Partnership Act 1961. While joint-venturers in an undertaking may owe certain fiduciary duties to one another, the existence of such duties does not necessarily make them partners under the said Partnership Act.

[4] In the construction of an agreement it would not be right to look at one clause in isolation. All the other relevant clauses in the joint venture agreement and in the 1985 agreement must also be considered in the context of the whole of the transaction. Regard must also be had to any surrounding circumstances which might legitimately be taken into consideration.

[5] Considering the joint venture agreement (more particularly clauses 8 & 12), and the 1985 agreement (more particularly clauses 1 & 18), as a whole, and contrasting them with clause 12 of the 1985 agreement (the 'deemed-to-be-trust' provision), it could not be said that the appellant's contention that a trust, free from the prohibitory order lodged by the second defendant, was deemed to exist by virtue of clause 12 of the 1985 agreement was correct.

[6] This is especially so bearing in mind that up to the time the prohibitory order was registered no step had been taken by the plaintiff requiring the first defendant to transfer all the sublots affected in this case to the plaintiff, to terminate the agreements, or to take over the project as provided in clause 12 of the 1985 agreement. The large measure of freedom and the wide powers of disposal with absolute retention of the sale proceeds, of the sublots

allocated to the first defendant and registered in its name, without accountability to the plaintiff, vested in the first defendant, were incompatible with the appellant's contention of the existence of a trust.

[7] Furthermore, there is unchallenged evidence from the second defendant that the monetary judgment obtained by the second defendant was in respect of works done on the parent land registered in the name of the first defendant and that the second defendant, at all material times, had no knowledge of the agreements between the plaintiff or his predecessor and the first defendant.

[8] It is difficult to believe that the plaintiff being a permanent director of the first defendant and a signatory to the company's cheques and being involved in the company's affairs since July 1985 had no knowledge of works having been done on the said land. Furthermore no caveat was lodged by the plaintiff against the said land. In the circumstances, both in law and in equity, the prohibitory order entered by the second defendant should remain on the Land Register.

[Appeal dismissed with costs to the second defendant]

[**Bahasa Malaysia** Translation of Headnote]

***UNDANG-UNDANG TANAH**: Tuan tanah memasuki perjanjian usahasama untuk membangunkan tanah - Pemaju menyerahkan kesemua hak dan tanggungan kepada defendan pertama - Tuan tanah menyerahhak kesemua hak-hak kepada plaintif - Defendan pertama memegang lot-lot pemaju dalam amanah untuk plaintif sehingga pelepasan tanggungjawab di bawah perjanjian tersebut - Defendan pertama memungkiri perjanjian - Plaintif memohon untuk memindahkan semula lot-lot pemaju kepada dirinya - Tanah tertakluk kepada perintah larangan yang diserah-simpan oleh defendan kedua - Defendan kedua merupakan pemiutang penghakiman defendan pertama - Samada defendan kedua menpunyai kepentingan dalam tanah - Samada defendan kedua berhak untuk menyerah-simpan perintah larangan terhadap tanah tersebut - Samada perjanjian usahasama antara tuan tanah dan pemaju bersifat perkongsian - Akta Perkongsian 1961, s. 26 - Samada plaintif merupakan rakan kongsi defendan pertama.*

***KONTRAK**: Perjanjian usahasama untuk membangunkan tanah - Lot-lot pemaju dipindahkan kepada defendan pertama - Perjanjian memperuntukkan pemindahan semula lot-lot kepada plaintif sekiranya berlaku kemungkiran - Defendan kedua menyerah-simpan perintah larangan terhadap tanah - Plaintif memohon untuk memindahkan semula lot-lot - Pembentukan perjanjian - Sama ada terdapatnya amnah atas nama plaintif berhubung lot-lot tersebut yang diumpukkan kepada dan telahpun dipindahkan kepada defendan pertama - Prinsip-prinsip terpakai dalam pembentukan perjanjian.*

Plaintif telah memohon, antara lainnya, untuk pengisytiharan bahawa beliau adalah tuanpunya yang sah bagi lot-lot tanah tertentu dalam Mukim Seremban dan bahawa defendan-defendan tidak mempunyai apa-apa kepentingan dalam lot-lot yang tertentu itu.

Bapa plaintif (tuan tanah) dan pemaju telah memasuki satu perjanjian usahasama (perjanjian tersebut) untuk membangunkan sebidang tanah menjadi sebuah kawasan perumahan. Melalui satu suratikatan penyerahhakan pemaju telah menyerahhak kesemua hak-hak dan tanggungan-tanggungannya di bawah perjanjian tersebut kepada defendan pertama dan melalui satu perjanjian bertarikh 1 Julai 1985 (perjanjian 1985 tersebut) tuan tanah telah menyerahhak kesemua hak-haknya kepada plaintif.

Perjanjian 1985 tersebut, antara lainnya, memperuntukan supaya tuan tanah memindahkan lot-lot pemaju ke atas nama defendan pertama dan plaintif dijadikan pengarah tetap defendan pertama. Perjanjian 1985 tersebut selanjutnya memperuntukkan bahawa defendan pertama dianggap pemegang kesemua lot-lot defendan dalam amanah bagi plaintif sehingga penyiapan dan pelepasan kesemua tanggungajawab defendan pertama di bawah perjanjian tersebut. Adalah seterusnya diperuntukkan bahawa jika defendan pertama tidak dapat meneruskan projek perumahan tersebut, defendan pertama dikehendaki memindahkan semula kesemua lot-lot pemaju tersebut kepada plaintif.

Di atas kemungkiran perjanjian-perjanjian tersebut, plaintif cuba memindahkan semula lot-lot pemaju tersebut tetapi mendapati bahawa defendan kedua telah menyerah-simpan perintah larangan terhadap tanah tersebut. Defendan kedua mengatakan bahawa ia mempunyai hak untuk memasukkan perintah larangan tersebut berhubung dengan tanah tersebut kerana tanah tersebut telah didaftarkan atas nama defendan pertama, penghutang penghakimn defendan kedua berhubung dengan kerja-kerja bangunan yang dijalankan ke atas tanah tersebut oleh defendan kedua.

Pesuruhjaya Kehakiman perbicaraan yang bijaksana menolak permohonan plaintif dan memutuskan bahawa defendan kedua adalah berhak untuk menyerah-simpan perintah larangan tersebut dan bahawa plaintif tidak boleh memindahkan semula tanah tersebut kepada dirinya tanpa menjelaskan terlebih dahulu jumlah penghakiman tersebut. Pesuruhjaya Kehakiman yang bijaksana berlandaskan keputusannya atas alasan-alasan utama bahawa :

1. Sebagai satu pihak kepada perjanjian usahasama itu, plaintiff adalah rakan kongsi dalam lingkungan maksud terma tersebut dalam Akta Perkongsian 1961 (Akta tersebut).

2. Penghakiman yang diperolehi oleh defendan kedua terhadap defendan pertama adalah untuk kerja-kerja yang telah dilakukan ke atas tanah yang telah didaftarkan atas nama defendan pertama. Selaras dengan penghakiman tersebut, defendan kedua telah memasukkan perintah larangan tersebut terhadap tanah tersebut.

Plaintif telah merayu.

Diputuskan:

[1] Ungkapan "rakan kongsi" ditafsirkan dalam s. 3(1)Akta tersebut sebagai perhubungan yang sedia ada antara orang-orang yang menjalankan perniagaan bersesama dengan harapan untuk mendapat keuntungan. Dalam kes semasa yang sedang dirayu, plaintif (melalui bapanya yang merupakan satu pihak kepada perjanjian pertama) memperuntukkan tanah, dan defendan pertama pula dikehendaki menperuntukkan modal, tenaga-kerja dan perkhidmatan untuk membangunkan dan membina di atas tanah tersebut. Di bawah perjanjian tersebut, setiap satu hendaklah mengambil, dengan menyingkirkan pihak yang satu lagi, beberapa lot-lot kecil dengan atau tanpa bangunan didirikan di atasnya di mana haruslah terdapat kebebasan yang sepenuhnya untuk berurusan atau melupuskan sepertimana dia atau ianya inginkan.

[2] Dalam keadaan yang sedemikian, oleh kerana setiap satunya berniat untuk menjalankan perniagaan yang berasingan sama sekali, maka tidak terdapat "perniagaan bersesama" mahupun, dikatakan, "dengan harapan untuk membuat keuntungan" daripada perniagaan yang sedemikian. Dengan itu perjanjian yang dimasuki tidak membawa kepada perkongsian.

[3] *Newacres Sdn. Bhd. lwn. Sri Alam Sdn. Bhd.* bukannya merupakan autoriti bagi proposisi bahawa pengusaha-pengusaha dalam kesemua perjanjian usahasama adalah rakan kongsi dalam maksud Akta Perkongsian 1961. Sedangkan pengusahasama dalam sesuatu aku janji

mungkin terhutang tugas-tugas fudisiari kepada satu dan yang lain, kewujudan tugas-tugas yang sedemikian tidak semestinya menjadikan mereka rakan kongsi di bawah Akta Perkongsian tersebut.

[4] Dalam pembentukan sesuatu perjanjian ianya adalah tidak wajar untuk hanya menumpukan perhatian kepada satu fasal sahaja. Kesemua fasal-fasal relevan yang lain dalam perjanjian usahasama tersebut dan perjanjian 1985 tersebut haruslah juga dipertimbangkan dalam segi keseluruhan urusan tersebut. Pertinbangan haruslah juga diberikan kepada mana-mana keadaan persekitaran yang mungkin patut secara sahnya dipertimbangkan.

[5] Menpertimbangkan perjanjian usahasama tersebut (khususnya fasal-fasal 8 dan 12), dan perjanjian 1985 tersebut (khususnya fasal-fasal 1 dan 18), secara keseluruhannya, dan bercanggahan dengan fasal 12 perjanjian 1985 tersebut (peruntukan "dianggapkan-sebagai-amanah"), ianya tidak boleh dikatakan bahawa penegasan perayu bahawa sesuatu amanah, yang bebas daripada perintah larangan yang diserah-simpan oleh defendan kedua, telah dianggap wujud menurut fasal 12 perjanjian 1985 tersebut adalah betul.

[6] Ini adalah khususnya sedemikian dengan memikirkan bahawa sehingga waktu perintah larangan tersebut didaftarkan tidak ada langkah yang telah diambil oleh plaintif yang menghendaki defendan pertama memindahkan kesemua lot-lot kecil yang terjejas dalam kes ini kepada plaintif, untuk menamatkan perjanjian tersebut, atau mengambil-alih projek tersebut sepertimana yang diperuntukkan dalam fasal 12 Perjanjian 1985 tersebut. Kebebasan serta kuasa pelupusan yang luas dengan penahanan terhadap hasil-hasil jualan lot-lot kecil yang umpukkan kepada defendan pertama dan didaftarkan atas namanya, tanpa dipertanggungjawabkan kepada plaintif, yang diletakhak dalam defendan pertama, adalah bertentangan dengan penegasan perayu mengenai kewujudan amanah.

[7] Selanjutnya, terdapat keterangan yang tidak dicabar daripada defendan kedua bahawa penghakiman kewangan yang diperolehi oleh defendan kedua adalah berkaitan dengan kerja-kerja yang telah dilakukan di atas tanah induk tersebut yang telah didaftarkan atas nama defendan pertama dan bahawa defendan kedua, pada setiap waktu yang material, tidak mengetahui tentang perjanjian-perjanjian antara plaintif atau pendulunya dan defendan pertama.

[8] Adalah sukar untuk mempercayai bahawa plaintif sebagai pengarah tetap defendan pertama dan seorang penandatangan kepada cek-cek syarikat dan terlibat dalam halehwal syarikat sejak bulan julai 1985 tidak mengetahui tentang kerja-kerja yang telah dijalankan di atas tanah tersebut. Selanjutnya tiada kaveat telah diserah-simpankan oleh plaintif terhadap tanah tersebut. Dalam keadaan yang sedemikian, di sisi undang-undang dan juga menurut ekuiti, perintah larang yang dimasukkan oleh defendan kedua seharusnya dikekalkan pada Daftar Tanah.

[Rayuan ditolak dengan kos kepada defendan kedua]

Cases referred to:
Beckingham v. Port Jackson & Manly Steamship Company [1957] SR (NSW) 403 ***(refd)***
Newacres Sdn. Bhd. v. Sri Alam Sdn. Bhd. [1991] 3 MLJ 474 SC ***(cons)***
English v. Dedham Vale Properties Ltd. [1978] 1 AER 382 ***(refd)***
Laskin v. Bache & Co. Inc., [1972] 23 DLR (3d) 385 at 392 ***(refd)***
Chamber Colliery Co. Ltd. v. Twyerould [1893] [1915] 1 Ch. 268 ***(refd)***
Barton v. Fitz-Gerald [1812] 15 East 530 ***(refd)***

Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116 FC ***(dist)***

Legislation referred to:
Partnership Act 1961, ss. 3(1), 4

Other sources referred to:
*Halsbury's Laws of England***,** 4th Edition, Vol. 17, Para 28

For the appellant - K.H. Koh (S. Thilagavathy with him); M/s K.H. Koh Azhar & Koh
For the respondent - T. Suresh; M/s Gill & Tang

JUDGMENT

Chong Siew Fai FCJ:

By an origanating summons the plaintiff sought against the 1st and the 2nd defendants the following relief:

(a) a declaration that the plaintiff was the lawful owner of the following 13 lots of land in the Mukim of Seremban:

No. Hakmilik (HS/D)	P.T.No
12623	633/34
12632 to 12636	633/357 to 633/361
12643 to 12649	633/368 to 633/374

(b) a declaration that the lst and the 2nd defendants did not possess any interest in the said above 13 lots;

(c) for an order to change or alter ("untuk mengubah") the prohibitory order dated 10 August 1990 against the said above 13 lots; and

(d) for an order that the 1st defendant or the Assistant Registrar of the Court transferred the ownership of the said above 13 lots to the plaintiff as the lawful owner.

After hearing Counsel for both sides and considering the evidence adduced, the learned trial Judicial Commissioner dismissed the application. (See [1994] 4 CLJ 113). At the concluding part of his grounds of judgment he said:

> In my view, the second defendant was entitled to obtain the prohibitory order in the circumstances and the plaintiff could not seek the re-transfer of the land to him without first satisfying the judgment sum. Having so considered the matter, I dismissed the plaintiff's application with costs.

Against the order of dismissal the plaintiff appealed to this Court.

Having heard the appeal, we dismissed it with costs. However, since we differed with the learned Judicial Commissioner on the point of partnership which formed the substantial basis of his judgement, we considered it desirable to give our reasons.

Facts

Initially the plaintiff's father was the registered, owner of all that parcel of land under C.T. 773 lot 633 in the Mukim of Seremban (the 'parent' land).

By an agreement dated 21 December 1976 entered into between the plaintiff's father, Chooi Tai Fun, and one Lim Ching Kwui (Lim), (hereinafter referred to as the "joint venture agreement") the parties agreed to embark upon a joint-venture project in which the plaintiff's father would contribute the parent land and Lim would, at his own entire costs and expense, convert and subdivide it into not less than 513 sublots, and build and complete thereon in

2 phases terrace houses and shophouses which were to be shared between the parties in the ratio of 17:83 in the 1st phase, and 23:77 in the 2nd phase, all in Lim's favour. The whole project was to be completed within some 3 years and 8 months, subject, however, to delay for certain permissible causes.

Clause 11 of the agreement requires the plaintiff's father as the registered landowner, upon being requested by Lim (developer) to charge the parent land to a bank or financial institution as security for bridging finance to be used for developing the parent land.

Under clause 8 of the agreement Lim (developer) was, while pending the approval of conversion and layout plan, entitled to enter into sale agreements for the sales to intended purcha-sers of all the sublots that were to belong to Lim (developer), and all sale prices payable thereunder were to be paid direct to and belonged absolutely to Lim (developer) who need not account to the plaintiff's father in respect thereof. In view of the significance of the clause, I would reproduce it below:

> 8. Pending approval of conversion and layout plans, the landowner hereby agrees that the developer has the full right and liberty to accept bookings and to enter into sale agreements with intended purchasers in respect of the developer's lots which said sale agreements shall also be executed by the landowner provided the requisite approval for sub-division and conversion has already been obtained and that the sale agreements are in respects in conformity with the provisions of r. 12 of the Housing Developers (Control and Licensing) Rules 1970. Further all monies paid or payable by purchasers on account of the purchase price in respect of the developer lots shall absolutely belong and be payable directly to the developer who shall not have to account to the owner for all such monies received or receivable.

Clause 12 of the agreement expressly authorised a solicitor firm to release the separate titles respecting Lim's (developer's) lots to the banks of other financial insitutions to whom the purchasers had applied for housing loans as security for the loans.

There was also a provision in the joint-venture agreement permitting Lim (developer) to assign his rights and interests therein to a private limited company to be formed.

By an assignment dated 12 June 1978, Lim (developer) assigned all his interests, rights, benefits, duties, liabilities under the said agreement dated 21 December 1976 to the 1st defendant-company. The plaintiff's father was duly notified of the asssignment.

Another agreement dated 1 July 1985 was entered into between the 1st defendant-company of the 1st part, the plaintiff's father of the 2nd part and the plaintiff of the 3rd party. The recital to this agreement (hereinafter referred to as "the trilateral agreement") shows, *inter alia*, that by 1 July 1985:

> (1) approval for the conversion and subdivision of the parent land had been obtained;
>
> (2) the numbers of units of houses, flats or buildings to be built under each of the 2 phases of the construction had been ascertained. In fact the houses and flats under the 1st phase were "under the closing stages of completion and pending the issue or the certificate of fitness for occupation from the relevant authorities".
>
> (3) allotment of the entitlement of the plaintiff's father under the 1st phase of the development had been completed.

By the trilateral agreement, the plaintiff's father agreed, on execution thereof, to transfer to the 1st defendant-company the latter's entitlement (128 lots) under the 2nd phase. The plaintiff's father would also transfer all his units in favour of the plaintiff, and the time for completion of the agreement including the 2nd phase of the project was 30 months from 1

July 1985 with permissible extension of a further 42 months in certain circumstances, except for certain lots the development of which were deferred as provided in clause 4 thereof. It may be noted that the 30 month stipulation would take the agreement to 31 December 1988.

Also, by the trilateral agreement, the plaintiff's father "convey transfer and assign" to the plaintiff absolutely all his rights, interests, title and benefits in the joint venture agreement, the instant agreement and certain "supplementary agreements thereto" which were not exhibited.

The plaintiff was made a permanent director of the 1st defendant-company but was indemnified from all liabilities incurred prior to his appointment. The plaintiff was also made a permanent signatory to all bank accounts including cheques of the 1st defendant-company relating to the development of the housing estate.

The trilateral agreement further stated in clause 12 that the 1st defendant-company was, until the completion and discharge of all its obligations, to be deemed to hold its units in trust for the plaintiff 'subject always to the express condition' contained in the agreement, and that in the event of the 1st defendant-company failing, abandoning or being unable to carry on with the project, the 1st defendant-company would be required to transfer all its units to the plaintiff, and the plaintiff would be entitled to take over the project upon such terms as he deemed fit, or alternatively, to enforce the guarantee against the guarantors. The clause runs:

> 12. The Developer shall until the completion and discharge of all its obligations to the landowner's assign hereunder to be performed including the completion of the landowner's units (as may be certified practical completion by the developer's registered architect), be deemed to hold all the developer's units in trust for the landowner's assign subject always to the express conditions contained herein; and in the event the developer fail or are unable to carry on with the housing development or abandons the same without discharging its obligations aforesaid the developer shall be required to transfer all the developer's units to the landowner's assign and the landowner's assign shall be entitled to take over the said housing development upon such terms as he shall deem fit or alternatively the landowner's assign shall be entitled to enforce the personal guarantee against the said guarantors.

In respect of the development of the parent land and the sublots sold by the 1st defendant-company, the 1st defendant-company was to pay all taxes relating thereto and to keep the plaintiff indemnified in respect thereof. (Clause 18 of the trilateral agreement).

As matters turned out, the 1st defendant-company failed to observe the conditions to construct the houses and was in breach.

On 29 April 1988 the 2nd defendant-company obtained a judgment in the sum of RM 136,631.50 against the 1st defendant-company in civil suit no. 23-576 of 1986 in the High Court at Seremban for works done on the parent land for the 1st defendant company.

The 2nd defendant-company also said at all, material times it had no knowledge of any agreement between the plaintiff and the 1st defendant-company.

On the strength of the judgment the 2nd defendant-company lodged a prohibitory order dated 5 September 1988 against the following parcels of land that were amongst the lots already transferred to and registered in the name of the 1st defendant-company:

Jenis dan No. Hakmilik	Lot/P.T.
H.S. (D) 12623	633/348
H.S. (D) 12632	633/357
H.S. (D) 12633	633/358

H.S. (D) 12634 633/359

There is material indicating that the 1st defendant-company was under receivership though it is not clear when exactly this took place. However, according to the notes of proceedings, the receiver and manager of the 1st defendant-company through a legal representative did appear in Court on 30 October 1992 and expressed that it would not take part in the action because the lots in question had no connection with them. No judgment had been entered against the 1st defendant-company. Neither is there any evidence suggesting the termination or rescision of the joint-venture agreement.

Judgment of the High Court

The learned trial Judicial Commissioner dismissed the application of the plaintiff, holding that the 2nd defendant-company was entitled to lodge the probibitory order and that the plaintiff could not seek a re-transfer of the land to himself without first satisfying the judgment sum. He based his decision on 2 principal grounds:

(1) As a party to the joint-venture agreement, the plaintiff was a partner within the meaning of the term in the Partnership Act 1961.

(2) The judgment obtained by the 2nd defendant-company against the 1st defendant-company was for works done on the land registered in the name of the 1st defendant-company. In pursance of the said judgment, the 2nd defendant-company entered the prohibitory order against the said land.

Partnership

As to the finding of the learned trial Judicial Commissioner that the plaintiff was a partner (Point (1) above), with respect, we agreed with Counsel for the plaintiff (appellant) and found ourselves unable to accept. The term "partnership" is defined as the relation which subsists between persons carrying on a business in common with a view of profit. (Section 3(1) of the Partnership Act 1961). In deciding whether or not a partnership exists, the Court, apart from giving regard to the relevant rules in s. 4 of the Partnership Act 1961, must consider the intentions of the parties as appearing from the whole facts of the case and the contract they had made.

The opening sentence of r. (c) of s. 4 of the Act provides: "the receipt by a person of the share of the profits of business is *prima facie* evidence that he is a partner in the business". The term "*prima facie* evidence" means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention i.e. that the person is a partner in the business. (See *Halsbury's Laws of England* 4th Edition Vol. 17 Para 28).

In the Australian case of *Beckingham v. Port Jackson & Manly Steamship Company* [1957] SR (NSW) 403 even though the contract provided for the sharing of profits and contained a reference to a joint venture, the contract was held not to evidence a partnership because the agreement as a whole indicated that the parties sought to avoid such a relationship.

In the instant case under appeal, the plaintiff (through his father who was a party to the initial agreement) provided the land and the 1st defendant-company was to provide capital, labour and services to develop and build on the land. With their combined resources they were to share the ultimate product in agreed proportions in that each was to take, to the exclusion of the other, certain sublots with or without buildings erected thereon respecting which there was to be complete freedom to deal or dispose as he or it wished. In other words, each intended a wholly separate business; there was no "business in common" i.e. a

single business by the parties nor, it follows, "with a view of profit" from such business. In our view, therefore, no partnership resulted from the agreement.

At the hearing of the appeal, *Newacres Sdn. Bhd. v. Sri Alam Sdn. Bhd.* [1991] 3 MLJ 474 SC was cited. That case, however, is no authority for the proposition that joint-venturers in all joint-venture agreements are partners within the Partnership Act 1961. It dealt with the question of fiduciary relation. But the classes of case in which a fiduciary duty has been held to exist are not closed. Thus in *English v. Dedham Vale Properties Ltd.*[1978] 1 AER 382 a fiduciary duty was held to exist between a vendor and a proposed purchaser of land. At page 398, Slade J observed:

> I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed.

In the Canadian case of *Laskin v. Bache & Co. Inc.,* [1972] 23 DLR (3d) 385 at 392, Arnup JA stated:

> In my opinion, the category of cases in which fiduciary duties and obligations arise from the circumstances of the case and the relationship of the parties is no more 'closed' than the categories of negligence at common law.

While joint-venturers in an undertaking may owe certain fiduciary duties to one another, the existence of such duties does not necessarily make them partners under the said Partnership Act.

Trust - Construction of Agreements

Next, relying on clause 12 (the'deemed-to-be-trust' clause reproduced above) of the trilateral agreement, Counsel for the plaintiff (appellant) submitted that there existed a trust in favour of the plaintiff respecting those units allotted to and already transferred to the 1st defendant-company. We were of the view that in the construction of an agreement, it would not be right to look at one clause in isolation. All the other relevant clauses in the joint venture agreement and in the trilateral agreement must also be considered in the context of the whole of the transaction. Regard must also be had to any surrounding circumstances, if any, which might legitimate be taken into consideration. In *Chamber Colliery Co. Ltd. v. Twyerould* [1893] [1915] 1 Ch. 268 (note) HL at 272 Lord Watson said:

> I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

And, in *Barton v. Fitz-Gerald* [1812] 15 East 530 Lord Ellenborough CJ said:

> It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done. (541).

Thus, it is a matter of construction of the agreements as a whole. The 'deemed-to-be-trust' provision must, of course, be considered and given its appropriate effect, but it is capable of being rebutted by other provisions in the context of the agreements and on the particular facts of the case. Clause 8 of the joint venture agreement, which I have set out *in extenso* clearly intended that the object of the payments, so far as concerning the sublots allotted to

the developer, was to confer absolute benefits on the developer, at least during the subsistence of the joint venture agreement which, on evidence, was never terminated.

After considering the joint venture agreement and the trilateral agreement as a whole, more particularly the above clause 8 and clause 12 (solicitor firm to release the separate titles sold by developer to purchasers' banks or financial institutions as security for loans) of the joint venture agreement, as well as the following clauses in the trilateral agreement i.e.:

Clause 1. (the transfer of the developer's 128 lots to the 1st defendant-company, which was in fact done).

Clause 18. (payment by the 1st defendant-company of all taxes respecting development of the parent land and the sublots sold),

and contrasting them with clause 12 (the'deemed-to-be-trust' provision) of the trilateral agreement, and bearing in mind that up to the time the prohibitory order was registered, no step had been taken by the plaintiff requiring the 1st defendant-company to transfer all the sublots affected in this case to the plaintiff, or to terminate the agreements, or to take over the project undertaken by the 1st defendant-company as provided in clause 12 of the trilateral agreement, we were of the opinion that in so far as relating to the sublots allocated to the 1st defendant-company and registered in its name, the large measure of freedom and the wide powers of disposal with absolute retention of the sale proceeds without accountability to the plaintiff vested in the 1st defendant-company, were incompatible with the appellant's contention that a trust, free from the prohibitory order lodged by the 2nd defendant-company, was deemed, to exist by virtue of clause 12 of the trilateral agreement. It might have been otherwise if the agreements for the building project had been duly terminated before the registration of the prohibitory order. This, however, was not the case.

Furthermore, there is unchallenged evidence from the 2nd defendant-company, that the monetary judgment dated 29 April 1988 obtained by the 2nd defendant-company was in respect of works done on the parent land registered in the name of the 1st defendant-company and that the 2nd defendant-company at all material times had no knowledge of the agreements between the plaintiff or its predecessor and the 1st defendant-company. (See paragraphs 7, 9 and 10 of the affidavit by Ong You Seng affirmed on 22 February 1991).

Besides, it is difficult to believe that the plaintiff, being a permanent director of the 1st defendant-company, a mandatory signatory to the company's cheques and being involved in the company's affairs since July 1985, had no knowledge of works having been done on the said land.

Also, no caveat was lodged by the plaintiff against the said land.

In our view, both in law and equity, the prohibitory order entered by the 2nd defendant-company should remain on the Land Register.

For the appellant (plaintiff), Counsel relied on the following passage of Gill FJ in *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116 FC at 119 1st Col. G:

> It seems clear from the above authorities that, by virtue of the memorandum of transfer, the respondent obtained an equitable title to the land. To put it in other words, the judgment-debtor in this case, by executing a memorandum of transfer on receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the respondent.

In *Karuppiah Chettiar v. Subramaniam*, *supra,* the registered co-owner of a piece of land sold his entire undivided share therein. The purchaser, Subramaniam, who had paid the price

in full but could not obtain registration of the transfer to him because of the vendor's failure to deliver up the issue document of title, lodged a caveat to protect his claim. Subsequently, a judgment-creditor of the vendor duly obtained a prohibitory order in respect of the land and had it entered in the Register. Subramaniam intervened in the execution proceedings to set aside the prohibitory order. The Court of Appeal, by a majority decision, held that only such beneficial interest as a judgment-debtor actually possessed could be seized and sold and that since the vendor retained only a bare title to the land, the prohibitory order entered against the vendor must be set aside.

Karuppiah Chettiar v. Subramaniam, supra, in our view, is distinguishable:

1. In *Karuppiah Chettiar's* case, *supra*, it, was a sale transaction whereas in our present case it was a development project;
2. In *Karuppiah Chettiar's* case, *supra*, the sale and purchase price had been paid by the purchaser (Subramaniam) in full whereas this was not applicable in our instant case; and
3. More importantly, the nature of the transactions as well as the terms and conditions of the agreements in the two cases were vastly at variance and called for different consideration.

For the above reasons (some of which differed from those of the learned Judicial Commissioner), we dismissed the appeal with costs to the 2nd respondent (2nd defendant-company).